

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING AND ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

DECEMBER 6, 2005

+ + + + +

The Public Meeting was convened in the Office of Zoning Hearing Room, Suite 200 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:18 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN G. PARSONS	Commissioner (NPS)
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

JOEL LAWSON

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This transcript constitutes the minutes
from the public meeting held on December 6, 2005.

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A-G-E-N-D-A

<u>BOARD ACTIONS/MOTIONS</u>	<u>Page No.</u>
Application of AMM Development, Inc., No. 17381 1400 Block of Rock Creek Ford Road, N.W.	4
Vote to approve Application No. 17381	9
Application of Taylor Property Development, LLC, No. 17388 - 1360 Kenyon Street, N.W.	10
Vote to approve Application No. 17388	19
Motion for Reconsideration and Partial Rehearing, pursuant to Section 3126, of Order No. 17109 of Kalorama Citizens Association (KCA)	22
Vote to deny motion for reconsideration and partial rehearing	29
Application of Ellis Denning Properties, LLC on behalf of Ernest L. Murphy, No. 17393	31
Vote to approve Application No. 17393	40

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P-R-O-C-E-E-D-I-N-G-S

10:18 a.m.

CHAIRMAN GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the 6th of December, 2005 public meeting of the Board of Zoning Adjustments of the District of Columbia. My name is Geoff Griffis, chairperson. Joining me today is the vice-chair, Ms. Miller and Mr. Etherly. Representing the National Capital Planning Commission with us is Mr. Mann. And representing the Zoning Commission will be differing members based on the case that we have already heard.

Copies of today's meeting agenda are available for you. We do have a little change in the schedule of the decisions for this morning, but I will get to that last.

Let me just make a very quick note that in our meetings of course we have already proceeding through the hearings. There is not an opportunity for public comment or additional testimony; rather, this is an opportunity for the Board to present its deliberations and make decisions on cases that are already previously been heard.

I'd ask that everyone please turn off their cell phones and any other noise making devices

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1 at this time so we don't disrupt the proceedings; and,
2 most importantly, don't disrupt the transmission and
3 the record being created for this session.

4 Let me say a very good morning to Ms.
5 Bailey on my far left with the Office of Zoning and
6 also Mr. Moy.

7 Let me ask staff if they have any
8 preliminary matters for the Board's attention in
9 regards to this public meeting.

10 MR. MOY: No, sir. Good morning.

11 CHAIRMAN GRIFFIS: Good morning, Mr. Moy.

12 Very well. Then I understand that we are
13 awaiting a Zoning Commission member for one of the
14 cases, 17393, which would be the Ellis Denning case,
15 which was set for first on the schedule this morning.
16 I am not presiding over this case, but I understand
17 the board members would like to move that in
18 accommodation to the Zoning Commissioner who will be
19 present at some time. Therefore, we'll move ahead and
20 call the next case that's on the schedule, 17381,
21 which is the AMM Development.

22 MR. MOY: Yes, sir. Good morning, Mr.
23 Chairman Members of the Board. That case is
24 Application No. 17381 of AMM Development, Inc., which
25 for the Board's note -- the new property owner is AGG

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1 International. Pursuant to 11 DCMR Section 3104.1 for
2 a special exception to permit new residential
3 development for row dwellings under Section 353, and
4 for multiple buildings to be considered a single
5 building under Section 410, in the R-5-A District at
6 premises 1400 block, north side of Rock Creek Ford
7 Road, N.W., between Fort Stevens Drive, N.W. and 14th
8 Street, N.W. And that's in Square 2726, Lot 810.

9 On November 8th, 2005 the Board completed
10 public testimony on the application and scheduled its
11 decision on December 6th, 2005. The record is closed
12 except for additional filings from the applicant and
13 any submission of comments from the ANC and the
14 neighborhood association.

15 The office has not received any filings
16 and that completes the staff's briefing, Mr. Chair.

17 CHAIRMAN GRIFFIS: Excellent. Thank you
18 very much, Mr. Moy.

19 Yes, we did in fact finish the case on
20 this. There was opposition voiced by that testimony
21 that was brought to us and we had left the record open
22 for continued discussions with the community,
23 specifically the ANC. Mr. Moy has adequately
24 indicated that there is no other further information.
25 I think the record is full and it's not opposed. We

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1 should continue your deliberation.

2 I would note that there was some issue in
3 the original application that came through rather as
4 it was processing prior to coming forward to the Board
5 that there was a cantilevered aspect of the town
6 houses that the Office of Planning had some difficulty
7 with. Also, I would take note that DHCD also had
8 difficulty with that. The plans of course that were
9 presented in the public hearing were corrected, or
10 rather changed that and removed the cantilevering
11 aspect. The Office of Planning had then come through
12 as supportive of the application during the hearing.

13 I would open it up and state that I will
14 be supporting this application for the special
15 exception that would permit the new residential
16 development in the four row dwellings in the R-5-A
17 Zone District under Section 353. That of course
18 allows the multiple buildings to be considered as a
19 single building under 410 of Lot 810 on Rock Creek
20 Road, N.W. And I would make that a motion so we can
21 continue our deliberation under it.

22 I'd ask for a second.

23 MEMBER ETHERLY: Second, Mr. Chair.

24 CHAIRMAN GRIFFIS: Thank you very much,
25 Mr. Etherly.

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1 I think the criterion of course is laid
2 out very clearly of what needs to be looked at from
3 the Board.

4 I would note that some of the opposition
5 that came forward was the difficulty of whether
6 communication was adequately made with the community.
7 I think there are several things. One, our public
8 hearing process allowed for additional testimony to be
9 provided. The elongated schedule in setting this for
10 decision making also was a factor, I believe, in
11 filling the record and giving an opportunity for the
12 community. When the substantive issues come down to,
13 as those testified in opposition we need to address,
14 there were several comments that were of some concern
15 to me and I think that they move well beyond the
16 jurisdiction of the Zoning Regulations and that which
17 is under our authority. And some of those questions
18 were whether the community could control who was
19 there, who would live there, etcetera. Obviously, we
20 are looking at the more land use and specifically
21 zoning issues, and I think that it meets all the
22 criterion and is a very persuasive and adequate
23 application and should be supported.

24 I'd open it up for others. Additional
25 comments?

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1 VICE-CHAIR MILLER: I just want to say
2 that I think this case was pretty straightforward and
3 the applicant did meet all the requirements.

4 CHAIRMAN GRIFFIS: Good. And I appreciate
5 you saying that. And I think we can be succinct with
6 this because, as we've now said numerous times, it is
7 full, the record. What's interesting about Section
8 533 in the R-5-A zone, it's really anticipating larger
9 development and a larger number of dwelling units.
10 This is particularly interesting in terms of just its
11 small number, and therefore, you know, some of the
12 questions that have -- in fact referral to the Board
13 of Education to see if the schools can adequately
14 support the development obviously show that the intent
15 of this regulation of a larger scale and that's why I
16 think we can be brief in our deliberation and in
17 showing how this meets the criterion.

18 And also under 410, I would say the same.
19 There are design aspects under 410 that are to be met
20 in terms of open stairs and access. Again, it's for
21 really looking at a much larger type of development,
22 even a garden apartment type and I think it is easily
23 met and fully meets the criterion and requirements.

24 Anything else? Yes? No?

25 (No audible response.)

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1 CHAIRMAN GRIFFIS: Very well. We do have
2 a motion before us that has been seconded. All those
3 in favor, signify by saying aye.

4 VICE-CHAIR MILLER: Aye.

5 MEMBER ETHERLY: Aye.

6 MEMBER MANN: Aye.

7 CHAIRMAN GRIFFIS: And opposed?

8 (No audible response.)

9 CHAIRMAN GRIFFIS: Very well. Record the
10 vote.

11 MR. MOY: Yes, sir. Staff would record
12 the vote as 4 to 0 to 0, this on the motion of the
13 Chairman Mr. Griffis to approve the application
14 seconded by Mr. Etherly. Also in support of the
15 motion Ms. Miller and Mr. Mann.

16 We also have an absentee ballot from Mr.
17 Jeffries who also participated on the application, on
18 the case, and his absentee vote is to approve the
19 application which would give a resulting vote to
20 approve as 5 to 0 to 0.

21 CHAIRMAN GRIFFIS: Excellent. Thank you
22 very much, Mr. Moy. We appreciate that. Let's call
23 the next case then for decision making. It would be
24 17388.

25 MR. MOY: Yes, sir. That case application

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1 is No. 17388 of Taylor Property Development, LLC
2 pursuant to 11 DCMR Section 3103.2 for a variance from
3 the nonconforming structure provisions under
4 Subsection 2001.3, to permit the renovation and
5 addition to an existing apartment house not meeting
6 the lot occupancy requirements under Section 403 in
7 the R-4 District at premises 1360 Kenyon Street, N.W.
8 That's in Square 2848, Lot 44.

9 Staff notes that the applicant at the last
10 hearing withdrew the zoning relief from open court
11 requirements under Section 406.

12 On November 15th, 2005, the Board
13 completed public testimony on the application and
14 scheduled its decision on December 6th, 2005. The
15 Board requested a filing from the applicant on
16 economic analysis and a written narrative of Mr.
17 Williams' oral testimony given on that day and a
18 supplemental report from the Office of Planning.

19 There are two filings to the Office, Mr.
20 Chairman. The first is a supplemental report from the
21 Office of Planning dated November 23rd, 2005. That is
22 identified in your case folder as Exhibit 28. The
23 second filing is from the applicant filed in response
24 to the Office of Planning's supplemental report.
25 That's dated November 23rd also and it's identified as

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1 Exhibit 29.

2 And that completes the staff's briefing,
3 Mr. Chairman.

4 CHAIRMAN GRIFFIS: Excellent. Thank you
5 very much, Mr. Moy. We do appreciate that and I would
6 take note that the Board did get served the two
7 additional exhibits and have read and reviewed it. It
8 will be part of our deliberation and I'm going to open
9 it up and hear all comments on this, of course, from
10 board members.

11 This is a particularly interesting, if not
12 problematic case, in my mind in reviewing it. Of
13 course we do have a recommendation from the Office of
14 Planning to deny the application and the history of
15 this of course is that it is in an R-4 zone. It is a
16 row dwelling that was for decades a tenement house.
17 And then subsequently in reissuances of certain of C
18 of Os or perhaps changes that weren't fully in the
19 record became an apartment building of stated units.

20 It is before us now to reduce the number
21 of units, however, it is to add a significant amount
22 onto the building itself and it's not meeting the lot
23 occupancy requirements, as Mr. Moy had indicated,
24 therefore a non-conforming structure and also the open
25 court which was removed by an aspect that was going to

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1 be put onto the building.

2 Let me open it up and have others speak to
3 the application at this time.

4 VICE-CHAIR MILLER: Going right to the
5 variance test, I think applicant has made the case for
6 a variance test and responded well to Office of
7 Planning's concerns.

8 Starting with uniqueness, I think that
9 they have shown that this is a unique building. And
10 that it's a nine-tenement unit apartment with very
11 small apartments, and it had been converted from a row
12 house, and that this is unique in the area. And I
13 think that Office of Planning didn't contest that
14 aspect of the variance test.

15 Then we get to practical difficulty. And,
16 seems to me that that did boil down to an economic
17 issue and that I was convinced that the applicant made
18 the case that there was an economic loss in renovating
19 the building in its same configuration for a nine-unit
20 tenement that they couldn't get the return on the
21 investment, that it would actually be a loss. And,
22 where as to convert it to the five units for which
23 there is a demand in the market and a need in the
24 marketplace, they would make a return on their
25 investment.

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1 I think that Office of Planning's concern
2 that this will encourage developers to somehow assume
3 that they're going to be able to get a variance and
4 factor that into their economic analysis is a little
5 bit misplaced because when I looked at their economic
6 analysis it didn't turn on how much they had actually
7 bought the property for. To me, that was a separate
8 issue. The economic analysis went to the difference
9 between renovating the apartment for nine units or
10 five. So I'm going to put that one aside.

11 I don't think there was an adverse impact
12 or an undermining of the integrity of the zone plan.
13 The residential use is being continued. It's within
14 the lot occupancy and the height with the zoning
15 district. There's no adverse impact on the
16 neighborhood, that the ANC supports this. It actually
17 improves the neighborhood. It rehabilitates a vacant
18 property. And, in one sense the density is being
19 decreased because the number of units is decreasing.

20 Also, going to the Office of Planning's
21 concern about there's an issue about a self-created
22 hardship and again I say that this was not a -- well,
23 first of all, sometimes developers or individuals do
24 take on a self-created hardship and they take a risk
25 by doing that and that's not a bar to variance relief

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1 in this district. And I want to bring the Board's
2 attention to the case of ALW v. Board of Zoning
3 Adjustment, 338(a) 2nd 428, and it's a D.C. Court of
4 Appeals case in 1975. And part of the reason it's not
5 is to allow someone to take a risk like this to
6 improve property, that they're not at fault that it's
7 not conforming. And, it just seems to me that this is
8 a good risk perhaps that shouldn't be discouraged.

9 CHAIRMAN GRIFFIS: Excellent. Thank you
10 very much. Others? Anything else?

11 MEMBER ETHERLY: Mr. Chair?

12 CHAIRMAN GRIFFIS: Yes?

13 MEMBER ETHERLY: I'll agree entirely with
14 the analysis of my colleague. I think she hit the
15 nail right on the head here.

16 I would suspect that this is not an
17 unusual circumstance. I would just anticipate that
18 we're going to see more of these types of
19 applications. This is not an unusual circumstance.
20 It is for purposes of the tests here, but I don't
21 think it's going to be a circumstance that we will not
22 see again in terms of looking at how we bring
23 productive buildings back into use in many segments of
24 the city, especially buildings that perhaps have sat
25 fallow for a number of years. But I think clearly as

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1 Mrs. Miller laid out, there is an unusual aspect to
2 the nature and shape and topography of this building's
3 layout that creates some serious considerations from
4 the standpoint of the strict application of the zoning
5 regs. And I think in particular when you pull all of
6 these factors together and combine them with the fact
7 that, as Mrs. Miller said, the granting of the
8 variance does not undermine the overall zone plan, I
9 think it makes for a very compelling case here.
10 You're bringing a unit back onto the market. As Mrs.
11 Miller pointed out, the ANC is in support.

12 And so I think all of those factors, as
13 was laid out in the prehearing submission, as the Gil
14 Martin case discussed, the Board can indeed look at
15 all of these things and taking them in their totality,
16 can indeed consider them properly as grounds for
17 approving a variance request.

18 Thank you, Mr. Chair.

19 CHAIRMAN GRIFFIS: Excellent. Thank you
20 very much.

21 Others?

22 (No audible response.)

23 CHAIRMAN GRIFFIS: Very well. Very well
24 said and deliberated, however, I am in direct
25 opposition to the points being made. In fact, I'm

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1 more aligned with the Office of Planning's contention;
2 not specifically on all their elements. However, I
3 see this; and Mr. Etherly and Ms. Miller have well
4 said that, I think the argument for other cases that
5 we've actually seen -- obviously every variance and
6 special exception stands on its own and that's the
7 first test, is the uniqueness. We've seen buildings
8 that are multiple dwellings that were built originally
9 that were established before or built prior to the
10 Zoning Regulations that were adopted. They became
11 non-conforming just on the base fact of the
12 regulations.

13 I see this as built as an existing row
14 dwelling in an R-4 zone. I see no structurally and
15 physically massing than any other buildings or there
16 wasn't presented any persuasive testimony.

17 I think the uniqueness is there. I don't
18 disagree that as a tenement house and the long history
19 of its use certainly creates a uniqueness. What I
20 have difficulty with and I think the Office of
21 Planning said in somewhat the same vein is drawing
22 that connection to where the practical difficulty
23 arising out of the uniqueness comes. To say that one,
24 because I was a nine-unit or a nine-tenement house,
25 you know, basically every room in the house could be

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1 rented out, to then come back and say in reducing the
2 density I just want to add on thousands of square feet
3 in order to make it accommodating, I don't see how it
4 rises out of the uniqueness of originally being
5 multiple tenanted.

6 Is there a difficulty in economics? I
7 absolutely agree that that's a substantive discussion
8 and testimony and case presentation that we can hear.
9 I think it's adequately stated in the Gil Martin, not
10 only the economic issue, but the confluence of
11 factors. Again, I didn't find it persuasive that
12 those confluence of factors were met here.

13 I'll just state that for the record and my
14 position and open it up for any others.

15 VICE-CHAIR MILLER: I just want to make
16 one other comment. I think what's also unique about
17 this that does lead to a practical difficulty is the
18 fact that it's a nine-unit tenement house and I think
19 that like -- perhaps its a Clerics' case or one of the
20 cases where the needs of the society have changed,
21 that there's not a demand, as far as I could tell, for
22 these type of units. And so that's one thing that
23 sets it apart. Perhaps it's not the structural --
24 well, it is structural, but it's also a use issue.

25 CHAIRMAN GRIFFIS: Good.

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1 VICE-CHAIR MILLER: I did want to make one
2 other point. And, we didn't touch upon that I think
3 it's consistent with the comprehensive plan and the
4 goals of keeping residents in the city and providing
5 the type of housing that's needed in the city.

6 CHAIRMAN GRIFFIS: Excellent. I
7 appreciate your saying that. I also think it fails on
8 that account. In terms of whether it would impair the
9 intent and integrity of the zone plan and map, or
10 whether it actually is in compliance with the
11 Comprehensive Plan; but I won't go to the
12 Comprehensive Plan, looking at R-4 zone, I think that
13 it in fact flies in the face of 2001.3 and as it is to
14 remedy situations that are non-conforming not to add
15 to or expand those non-conformities. I have never
16 taken this position and as I'm aware under 2001.3
17 because I think there are particular aspects to all
18 the other cases that I've been a part of that lead me
19 to deliberate differently and come to a different
20 conclusion, but I'll rest with that.

21 Anything else?

22 (No audible response.)

23 CHAIRMAN GRIFFIS: Very well. Why don't
24 we have a motion from the Board then?

25 VICE-CHAIR MILLER: I would move approval

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1 of Application No. 17388 of Taylor Properties, LLC
2 pursuant to 11 DCMR Section 3103.2 for a variance from
3 the non-conforming structure provisions under
4 Subsection 2001.3 to permit the renovation and
5 addition to an existing apartment house not meeting
6 the lot occupancy requirements, Section 403 in the R-4
7 District at premises 1360 Kenyon Street, N.W.

8 MEMBER ETHERLY: Second, Mr. Chair.

9 CHAIRMAN GRIFFIS: Excellent. Thank you
10 all very much.

11 We have a motion before us that's been
12 seconded. Final deliberation? Comments?

13 (No audible response.)

14 CHAIRMAN GRIFFIS: There's no further
15 comments or deliberation. I would ask for all those
16 in favor of the motion to signify by saying aye.

17 VICE-CHAIR MILLER: Aye.

18 MEMBER ETHERLY: Aye.

19 MEMBER MANN: Aye.

20 CHAIRMAN GRIFFIS: Opposed? Opposed.
21 Abstaining?

22 (No audible response.)

23 CHAIRMAN GRIFFIS: Mr. Moy, would you
24 record the vote, please?

25 MR. MOY: Yes, sir. Staff would record

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1 the vote as 3 to 1 to 0 on the motion of the Vice-
2 Chair Ms. Miller to approve the application, seconded
3 by Mr. Etherly. In support of the application, Mr.
4 Mann. We also have an absentee vote, Mr. Chairman,
5 from Mr. Hood who participated on the case and his
6 absentee ballot is to approve the application which
7 would give a resulting vote of 4 to 1 to 0.

8 CHAIRMAN GRIFFIS: Excellent. Thank you
9 very much, Mr. Moy.

10 Let's move ahead then to the next case on
11 the schedule. It would be 17109, if I'm not mistaken.

12 MR. MOY: Mr. Chairman?

13 CHAIRMAN GRIFFIS: Yes?

14 MR. MOY: Would the Board care for a
15 summary order on this case or not?

16 CHAIRMAN GRIFFIS: Oh, I'm sorry. I'm
17 keep ripping through those, don't I?

18 Board members, let's start from the very
19 beginning. I don't have any difficulty unless there's
20 any opposition to 17381 also to issue a summary order.
21 We could do the same in 17388.

22 (No audible response.)

23 CHAIRMAN GRIFFIS: Very well. Not noting
24 any at issue, waive rules and regulations and issue
25 summary orders on both of those cases.

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1 That being said, let's move to 17109.

2 Oh, and I'm sorry, we should have Mr.
3 Parsons join us also. If someone could just mention
4 to him, I believe he's here and present for that case.

5 MS. MONROE: Excuse me, Mr. Chair.

6 CHAIRMAN GRIFFIS: Yes?

7 MS. MONROE: Sorry to interrupt, but on
8 the first case I believe the ANC testified in
9 opposition. So with respect to the summary order --
10 the first case; I don't recall the number. Just now
11 you alluded to the first case and said you could do --
12 so I don't know if you want to consider a summary
13 order in that case, or not.

14 CHAIRMAN GRIFFIS: Very well. Let's move
15 ahead. We'll issue a full order on 17381 and we'll
16 address all of the ANC's points of issue in
17 opposition.

18 That being said, a very good morning to
19 you, Mr. Parsons. Welcome.

20 And let's call the next case.

21 MR. MOY: Yes, sir. That is a motion for
22 reconsideration and partial rehearing pursuant to
23 Section 3126 of Order No. 17109 of Kalorama Citizens
24 Association. This was an appeal that was filed by KCA
25 and that final order was issued November 8th, 2005.

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1 The Board is to act on the merits of this
2 motion and that is identified in your case folder,
3 identified as Exhibit 94. Your case folder also has
4 a second filing from ANC 1-C which is dated November
5 21st, 2004 and is identified as Exhibit 94, which that
6 believes in support of the motion from the appellant.

7 And that completes the staff's briefing,
8 Mr. Chairman.

9 CHAIRMAN GRIFFIS: Thank you very much,
10 Mr. Moy.

11 Board members, let's move ahead. Mr. Moy
12 has I think adequately laid out what is before us. It
13 is a motion for a reconsideration.

14 Mr. Moy, let me just ask for total
15 clarity, I know you issued what was submitted. We had
16 no submissions from the property owner, is that
17 correct?

18 MR. MOY: That's correct. That's to the
19 staff's understanding, Mr. Chairman.

20 CHAIRMAN GRIFFIS: Very well. So we have
21 a motion for rehearing and a motion for
22 reconsideration and that is based on the two elements.
23 And the first one is that perhaps the Board was not
24 correct in its deliberation in looking at what is in
25 the appeal known as the attic area and that should be

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1 looked at differently than was done and therefore
2 would be calculated in the gross floor area and
3 therefore would be calculated in the FAR.

4 The second issue, perhaps from a
5 reconsideration or perhaps for the rehearing, is the
6 fact that there was an error in the mapping, the
7 physical, the graphic representation of what the zone
8 district is for this property. But there is no
9 supporting Zoning Commission order that showed a
10 designation of the higher R-5 District. So therefore
11 it would have been a mistake in terms of creating the
12 map and it would have been a lower R-5-B, I think is
13 the zone district that it should be.

14 Let me open it up to all those for
15 deliberation and first set what I think is what and
16 how we need to deal with this issue.

17 A motion for reconsideration has a base
18 threshold test that it has to make and that base
19 threshold -- after that is met, then we can get into
20 the substance and decide what we do. We're obviously
21 not deciding the substance of issues of this, but
22 rather we actually grant a rehearing or a
23 reconsideration. And part of the threshold of that
24 aspect is to see whether the elements that are brought
25 forth now could not have been presented in the prior

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1 hearing or perhaps they are persuasive in terms of
2 reconsideration because of some new element that is
3 brought forth.

4 Let me open it up for comments. Yes, Mr.
5 Mann?

6 MEMBER MANN: In my reading of this motion
7 for the partial rehearing and reconsideration, I
8 personally didn't see any new information regarding
9 the attic that was not presented in the original
10 information presented during the hearing. My
11 understanding from this recent submission is just sort
12 of -- it's almost like a repackaging of the
13 information. But as far as I'm concerned, there was
14 no new information in here that I hadn't taken into
15 consideration. I think they've just used different
16 terms and different words to describe the information
17 that I already saw in the original materials.

18 CHAIRMAN GRIFFIS: Okay.

19 MEMBER MANN: So I don't think that there
20 was any new information that was presented in here.
21 There was nothing presented that I hadn't taken into
22 consideration in my own personal deliberation or
23 thoughts about this case.

24 CHAIRMAN GRIFFIS: Good. And I appreciate
25 your saying that. And in dealing with that in terms

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1 of the attic space now being termed interior balcony,
2 there was also some thought of -- well, the drawings
3 presented are the drawings that were presented in the
4 case, so I'm not sure where it was. And obviously
5 we're setting into the shoes of the Zoning
6 Administrators and approving a permit. So the whole
7 discussion of whether you could see this now open from
8 the street may well be the case, however, the Zoning
9 Administrator obviously wouldn't have had that and
10 doesn't approve permits based on that. The drawings
11 would have shown that it was open or closed, whatever
12 would have been the basis of the appeal or elements of
13 the appeal.

14 And likewise, each side had expert
15 witnesses, if I recall absolutely correctly, that were
16 architects so that they should have been and were able
17 to read the plans, whether it be in section plan or
18 any other of the documentation that came through.

19 Okay. Any other comments?

20 COMMISSIONER PARSONS: Well, I would
21 concur with both of you that no new evidence has come
22 forward. I don't want to be redundant and beat it to
23 death.

24 To the matter of whether this is properly
25 zoned or not, whether it's R-5-D or B, seems to me to

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1 be a matter that the Zoning Commission should
2 undertake rather than the Board. And I will commit to
3 do that. That is, I will ask my colleagues if they
4 will concur to investigate this, but I don't think
5 it's properly before the Board as to what zoning
6 category is or isn't in place here.

7 CHAIRMAN GRIFFIS: Good. Well said. I
8 was perplexed with what the BZA remedy would be.
9 First of all, it's not conclusive. It's a conjecture
10 that there was an error. There's no evidence that it
11 is an error; there's no evidence that it isn't, you
12 know? And we're kind of looking for something that
13 should exist and haven't found it yet. But how far
14 and how long do we open our -- or is that a basis of
15 which we would do a rehearing? We could do an
16 evidentiary hearing and I'm not sure that we actually
17 have the forum to undertake something of that nature.

18 Based on the facts that we have presented
19 today, we have a certified a lot for the zoning that
20 proceeded to the appeal. It would seem to me to need
21 substantially more new evidence in order for us to
22 open up the record on this. Although, I'm perplexed
23 because I would love to find the actual remedy if
24 there was an error, but I don't think that we have the
25 ability to do that.

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1 Others?

2 VICE-CHAIR MILLER: Are you soliciting
3 comments on the first issue only or on both of them?

4 CHAIRMAN GRIFFIS: Whatever you want to
5 talk about.

6 VICE-CHAIR MILLER: Well, I have a comment
7 on the second issue that the fact that it may have
8 been zoned incorrectly or mapped incorrectly affects
9 or decision on the exterior walls question, and I
10 don't believe it does.

11 Kalorama Citizens addressed the issue
12 where we talked about what the next door neighbor
13 could do affecting the exterior walls, but in
14 actuality I think the crux of our decision is really
15 where we state that exterior walls includes walls set
16 back from a property line. And that's how it's
17 determined, not by what can happen with the property
18 next door. So I think that they were saying that if
19 it was mapped incorrectly that meant that the property
20 next door could not build to a level that would make
21 the walls no longer exterior. And that's really not
22 determinative as we said in our --

23 CHAIRMAN GRIFFIS: Okay. I think we're
24 getting too far into the substantive element and we'd
25 first have to find that there was a graphic mistake so

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1 that this isn't actually zoned correctly. And then we
2 get into the elements of what the impact would be.

3 VICE-CHAIR MILLER: But I'm saying that
4 wouldn't affect our decision, because our decision
5 basically says no exterior walls are determined by the
6 property line, not by what can happen next door.

7 CHAIRMAN GRIFFIS: I see. Okay.

8 VICE-CHAIR MILLER: So it doesn't matter.
9 It's no matter to reconsider our decision.

10 CHAIRMAN GRIFFIS: Okay. On that issue.

11 VICE-CHAIR MILLER: In my view on that
12 issue.

13 CHAIRMAN GRIFFIS: Okay. All right. That
14 makes sense. Good.

15 Anything else?

16 (No audible response.)

17 CHAIRMAN GRIFFIS: Very well. Then it
18 appears to me then I think it would be appropriate
19 then to take up a motion to deny the Kalorama Citizens
20 Association motion for partial rehearing and
21 reconsideration of our order of the 8th of November,
22 2005 and I would ask for a second.

23 MEMBER MANN: Second.

24 CHAIRMAN GRIFFIS: Thank you, Mr. Mann.

25 I think the Board has focused strongly on

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1 this and I think is very diligent in wanting to find
2 the base substantive fact and wants to proceed and
3 fulfill our obligation in processing this. However,
4 this motion, I don't believe is supportable for a
5 partial rehearing or reconsideration as the
6 deliberation has stated.

7 Others?

8 (No audible response.)

9 CHAIRMAN GRIFFIS: Since there's no
10 further comment, then we do have a motion that's been
11 seconded. I would ask for all those in favor to
12 signify by saying aye.

13 VICE-CHAIR MILLER: Aye.

14 MEMBER MANN: Aye.

15 MEMBER ETHERLY: Aye.

16 COMMISSIONER PARSONS: Aye.

17 CHAIRMAN GRIFFIS: Opposed?

18 (No audible response.)

19 CHAIRMAN GRIFFIS: Abstaining?

20 (No audible response.)

21 CHAIRMAN GRIFFIS: Very well. Mr. Moy?

22 MR. MOY: Yes, sir. Staff would record
23 the vote as 5 to 0 to 0. This is on the motion of the
24 Chair Mr. Griffis to deny the motion as proposed and
25 seconded by Mr. Mann. Also in support of the motion

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1 to deny, Ms. Miller, Mr. Etherly and Mr. John Parsons.

2 CHAIRMAN GRIFFIS: Thank you. Is the
3 Board ready to proceed?

4 (No audible response.)

5 MR. MOY: Well, we have one other case
6 which is Application No. 17393.

7 CHAIRMAN GRIFFIS: That's right. Ms.
8 Miller, are you ready to proceed?

9 VICE-CHAIR MILLER: We were giving Ms.
10 Mitten the courtesy of participating in the hearing by
11 postponing this to the last decision. And I'm
12 wondering, have we heard from Ms. Mitten at all?

13 MS. BAILEY: Madam Chair, we have not, but
14 I would be willing to give it a final try if you'd
15 like.

16 VICE-CHAIR MILLER: My understanding is
17 you've put in a phone call, a couple phone calls?

18 MS. BAILEY: I've put in several phone
19 calls to her.

20 VICE-CHAIR MILLER: Okay.

21 MS. BAILEY: And she is tied up.

22 VICE-CHAIR MILLER: Okay. I think that
23 we'll proceed and if you want to call her in the
24 meantime, we can at least start the deliberation.

25 CHAIRMAN GRIFFIS: Thank you very much.

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1 Then as I'm not hearing this case, I'll turn it over
2 to you, Ms. Miller.

3 MR. MOY: Okay. This next case before the
4 Board for a decision is Application No. 17393 of Ellis
5 Denning Properties, LLC, on behalf of Ernest L.
6 Murphy, pursuant to 11 DCMR Section 3103.2, for a
7 variance from the residential recreation space
8 requirement under Section 773 and a variance to permit
9 access to required parking spaces from an alley less
10 than 10 feet in width under Subsection 2117.4 to allow
11 the construction of a 28-unit apartment house in the
12 C-2-A District at premises 1425 11th Street, N.W.
13 This is Square 338, Lots 37, 38, 39, 40, 800, 801, 802
14 and 803.

15 On November 22nd, 2005, the Board
16 completed public testimony on the application and
17 scheduled its decision on December 6th, 2005. The
18 Board closed the record except for the applicant's
19 filing to supplement the record regarding a brief on
20 the communication among the existing four buildings
21 and the new constructed building.

22 There have been no additional filings into
23 the record, Madam Chair. And that completes the
24 staff's briefing.

25 VICE-CHAIR MILLER: I think I'm just going

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1 to take one minute to see if we hear from Beverly and
2 I'm just trying to locate something in my file.

3 Okay. We've heard that Ms. Mitten is not
4 going to be able to make it. And, we were trying to
5 schedule it so that she could participate because when
6 we had the hearing in this matter she had a particular
7 interest in one of the issues and she had asked for
8 the opportunity to review the transcript and then
9 participate in the decision making. However, she's
10 engaged in some other matters and can't get away, so
11 we're going to proceed without her.

12 Basically, this case seeks two variances,
13 residential recreation space requirement and a
14 variance from the requirement that parking spaces be
15 located in an alley less than 10 feet in width, or
16 they are less than 10 feet in width.

17 In any event, I think the variances were
18 pretty straightforward in this case and the wrinkle in
19 this case went to Ms. Mitten's concern about the
20 trellis. But, what I suggest is that we first go
21 through the variances and see if we have any issue
22 with those variances.

23 The variance from the residential
24 recreation requirement was from 20 percent down to 10
25 percent and actually both variances stem from the fact

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1 that this property is constrained by four existing
2 flats that are on the property and that goes to the
3 uniqueness and exceptional circumstances here.

4 With respect to residential recreation
5 space, they cannot get the recreation space in the
6 original four flats, so they'd have to get it all in
7 the addition. And, in order for them to do that, they
8 would have to, according to my notes, remove one or
9 two units, which is a great practical difficulty in
10 this building. They can't put more on the roof
11 because they'd have to add additional stairways for
12 the egress, so they're very limited where they can put
13 the residential recreation space.

14 And I don't think we saw any adverse
15 impact from the reduction, that there are
16 opportunities in the area and I think that there are
17 trade-offs. When you use the space residential
18 recreation use, you have to give up something else.
19 And in this case, one of them was in particular living
20 units. So, I think that that's pretty clear here.

21 I don't know if others what to chime in
22 yet on the residential recreation requirement in
23 particular.

24 MEMBER MANN: Well, I would only that
25 there are other limitations that were imposed on this

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1 site because it was historic and HPRB weighed in and
2 said you have to do certain things and sort of limited
3 how they could utilize the property.

4 VICE-CHAIR MILLER: That's right. That's
5 right.

6 And then the parking variance. I gather
7 the width of the alley was like 9.75 and it had to be
8 10 feet in width. So this is a small difference, I
9 think. I think they showed that they could only put
10 the parking in a certain place, that they couldn't put
11 the parking underground. It wasn't economically
12 feasible to do that with this size building and they
13 were constrained by the physical areas around them.
14 So this is like no adverse impact to move the parking
15 space. Oh, they're going to move the parking space
16 one foot away from the alley and there's certainly no
17 adverse impact from that. So, I think that was a
18 pretty minor variance.

19 Office of Planning supports these
20 variances and the ANC supports them.

21 MEMBER ETHERLY: I'll note for the record,
22 Madam Vice-Chair, also that DDOT as well was in
23 support and found no objection to the increase of the
24 alley by one foot.

25 VICE-CHAIR MILLER: Thank you.

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1 Does anybody else have any more comments
2 on the variances?

3 (No audible response.)

4 VICE-CHAIR MILLER: Okay. The trellis
5 question. I just want to address that briefly. It's
6 not exactly before us. They haven't sought any relief
7 related to the trellis, however, Ms. Mitten did want
8 us to look at it, which we did at the hearing and have
9 reviewed the transcript.

10 For me personally, as one board member, I
11 see a problem with the trellis and I can see why she
12 was looking into it. We've been looking at trellises
13 in a few of our cases and it appeared to me, based on
14 the conversation we had at the hearing that the
15 trellis really didn't serve any purpose but to combine
16 the buildings for zoning purposes so that the
17 applicant would not have to seek relief from the
18 provision dealing with multiple buildings on a single
19 lot. And I don't know if the applicant is going to
20 have problems down the road with this or not. A
21 Zoning Administrator hasn't looked at it yet.

22 I don't have any problem. When I looked
23 back at the JPI case, I don't see any problem that a
24 trellis with over 50 percent coverage is maybe
25 considered a building. That's not my problem. I just

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1 question whether or not there's communication here
2 between the buildings pursuant to the zoning regs and
3 the Taiko Gotto case, which I look at on this trellis
4 issue. Anyway, it's my observation. I know that, you
5 know, in some instances sometimes applicants can seek
6 additional relief from what they sought originally if
7 a problem's noticed. But I do know that Office of
8 Planning did not weigh in and say that they thought
9 that the applicant needed additional relief. But,
10 anyway, it just looks problematic to me, but it
11 doesn't affect our decisions on the variances in this
12 case.

13 Others want to speak to this?

14 MEMBER ETHERLY: I appreciate your
15 comments, Madam Vice-Chair, and I am heartened by the
16 fact that as you noted that issue is precisely not
17 before us. So, while I would have perhaps rather
18 stayed away from it, I'll weigh in.

19 I do agree with you, I think broadly
20 speaking it is an issue that probably will merit some
21 clarification. I don't think it's an issue in this
22 particular case, (1), because it's not before us, but
23 (2), even if it were before us, I see this somewhat
24 differently than perhaps some of the other straight
25 trellis cases that we've seen.

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1 I just also do want to note for the record
2 my thank yous to the staff for pulling the transcript
3 together in a quick fashion, because we know it is
4 oftentimes difficult to get those transcripts quickly
5 and that was indeed part of our briefing materials in
6 advance of the case and it was helpful to revisit that
7 dialogue.

8 As you alluded to, Mrs. Mitten had
9 inquired in her absence through me about the nature of
10 the connection between the two buildings; between the
11 structures I should say. And as we discussed in the
12 course of the hearing, there is a stairwell that is
13 accessed through the lobby of the existing building
14 that would take you up to the third floor and then
15 from there you would move upward to access the roof of
16 the new additions. And then there is the trellis that
17 actually creates a connection; a physical connection,
18 if you will, between the structures.

19 I see that as a somewhat different
20 scenario than perhaps a straightforward trellis
21 situation where you simply have a trellis at the top
22 of a building, but otherwise no connection of any
23 type. As the issue has come up in prior cases, I
24 think we've seen more that type of example than an
25 example here where you have a connection that comes,

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1 you know, as per the zoning regs, above aground, above
2 grade and takes you to the roof of the adjacent
3 structure. But once again, I view, you know, all of
4 this as not even dicta, to an extent. I agree that it
5 is something to flag for this applicant and other
6 applicants, just as this issue gets clarity somewhere
7 down the road, but I think in this particular
8 instance, if this were before us, I would be strongly
9 of the mindset that this is more than satisfactory for
10 the purposes of the definition of connection as it's
11 interpreted under the current zoning regs.

12 MEMBER MANN: I'm also of the opinion that
13 we needn't take this item into consideration. And the
14 way that I thought about the information that was
15 presented regarding the trellis was it was just
16 additional background information that explained the
17 proposal and the shape of the building and the
18 building site and what they could and could not do
19 with the building. And I thought that it just helped
20 strengthen the reasons why they were seeking the
21 variances that they were.

22 VICE-CHAIR MILLER: Okay. And I just
23 would also like to add that, you know, as far as dicta
24 goes, you know, this wasn't totally before us, so it
25 wasn't as if the applicant had had the opportunity to

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1 fully make that argument. We looked at it somewhat
2 and maybe I'm not seeing something because it wasn't
3 fully explored, but I just did want to address it
4 because I think that Ms. Mitten was concerned with it
5 and I know we have been looking at trellises in
6 general and I didn't know whether or not this might be
7 a problem down the road.

8 Okay. Any other comments?

9 (No audible response.)

10 CHAIRMAN GRIFFIS: I think then we can go
11 forward and vote on the variances that are before us.

12 Okay. Do I have a motion?

13 MEMBER ETHERLY: Madam Chair, it would be
14 my motion to move approval of Application No. 17393 of
15 Ellis Denning Properties, LLC pursuant to 11 DCMR
16 Section 3103.2 for a variance from the residential rec
17 space requirement under Section 773 and a variance to
18 permit alley access to require parking spaces under
19 Subsection 2117.4 to allow the construction of a unit
20 addition at premises 1425 11th Street, N.W. and I
21 would invite a second.

22 MEMBER MANN: Second.

23 MEMBER ETHERLY: Thank you very much, Mr.
24 Mann. I think the record has been more than
25 adequately filled out by virtue of our deliberation on

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1 the elements of Section 773 as it relates to the issue
2 of the required recreation space requirements.

3 And then as respect to the issue of
4 variances; and in particular I found very compelling
5 the fact that there was not any concern on the part of
6 DDOT with regard to the variance for the parking.
7 Clearly, the ANC is in support. We are also informed
8 that the Logan Circle Civic Association is in support.
9 Office of Planning is in support of the application,
10 Madam Chair. I think the record is very full and
11 complete on this particular issue.

12 CHAIRMAN GRIFFIS: Thank you. We're ready
13 to vote?

14 (No audible response.)

15 CHAIRMAN GRIFFIS: Okay. All those in
16 favor, say aye. Aye.

17 MEMBER ETHERLY: Aye.

18 MEMBER MANN: Aye.

19 CHAIRMAN GRIFFIS: All those opposed?

20 (No audible response.)

21 CHAIRMAN GRIFFIS: All those abstaining?

22 (No audible response.)

23 CHAIRMAN GRIFFIS: And do we have an
24 absentee vote?

25 (No audible response.)

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1 CHAIRMAN GRIFFIS: No? Okay. Do you want
2 to call the vote, Mr. Moy?

3 MR. MOY: Yes, Madam Chair. Staff would
4 record the vote as 3 to 0 to 2. This is on the motion
5 of Mr. Etherly to approve the application, seconded by
6 Mr. Mann. Also in support of the motion Ms. Miller.
7 We have Zoning Commission member Carol Mitten
8 participating, but not voting and our Chairman Mr.
9 Griffis is recused from this case.

10 MEMBER ETHERLY: And, Madam Chair, as
11 there was no opposition to this case, I would be more
12 than comfortable with a summary order, if the Board
13 were so desirous.

14 VICE-CHAIR MILLER: Yes, I would agree.
15 Summary order.

16 And do we have any other matters on the
17 schedule?

18 MR. MOY: Yes, I believe Mr. Griffis had
19 another item that he wanted to take up.

20 VICE-CHAIR MILLER: Okay. Well, this case
21 is concluded then?

22 MR. MOY: That's correct.

23 CHAIRMAN GRIFFIS: Thank you.

24 (Whereupon, at 11:10 a.m. off the record
25 until 11:10 a.m.)

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1 CHAIRMAN GRIFFIS: Good. Thank you very
2 much. The last issue, board members, for our public
3 meeting this morning of the 6th of December, 2005 is
4 just an announcement regarding a case that was on the
5 schedule and was removed, 16839, and it is known as
6 the remand of Shagnon.

7 It was postponed several times. We are
8 actually postponing it again. And the reasoning for
9 this is we are awaiting the action from the Zoning
10 Commission. The Zoning Commission has taken up the
11 substantive matter in this case under a text
12 amendment. It ran into some very lengthy and
13 substantive discussions of the Zoning Commission.
14 It's case at the Zoning Commission is No. 0501. We
15 will await that final outcome before we process it
16 further.

17 That's all I'm aware of.

18 Is there anything else, Mr. Moy?

19 MR. MOY: No, that completes public
20 meeting session for today.

21 CHAIRMAN GRIFFIS: Excellent. Thank you
22 all very much. Then we'll adjourn our public meeting
23 and we'll resume at 11:30 and call to order the FMBZA.

24 (Whereupon, the meeting was concluded at
25 11:11 a.m.)

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